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RECENT AMERICAN DECISIONS.

*Superior Court of Cincinnati.*JOHN REA, PLAINTIFF IN ERROR vs. NATHANIEL SMITH ET AL.¹

1. A public officer, whose duty it is to arrest all persons charged with or suspected of the commission of crime, cannot claim any other or further remuneration for his services, than the fees allowed by law.
2. Whenever an officer makes an arrest, he is supposed to be acting in his official capacity; and where he performs the duty of sheriff, believing he was acting within the authority derived from law, the court will not allow him to change the relation and assume that of a private individual.
3. A sheriff, or any other ministerial officer, may arrest fugitives from the justice of any other State of the Union, and detain them for a reasonable time, until the requisition of the Executive can be made.
4. A reward offered may be apportioned, upon equitable principles, among several parties, as the court may direct.

James McMannus filed his petition at special term, against Nathaniel Smith, James Gardiner, and Darius C. Ingalls, claiming the benefit of a reward offered for the apprehension and conviction of the murderers of Alexander Gardiner and James Miller, who were found dead and mangled in the Ohio river, near Troy, Indiana. The offer of the reward was published in the Cincinnati Gazette and Louisville Journal, and is as follows: “\$500 *Reward*. We will pay the above reward for the arrest and conviction of the murderer or murderers of Messrs. Miller and Gardiner, The murders were committed on their trading boat, near Troy, Indiana. Two of the crew are missing, and they are suspected of being the perpetrators. One of them has sandy hair, is rather delicate, about eighteen years of age, and five feet ten inches high. The other is low set, stout built, with large black whiskers, and about twenty-five years of age.” Signed, “Smith & Graham; payable at the house of Smith & Graham.”

It is alleged that the following December, the plaintiff gave information to officers connected with the police of the city of St.

¹ We are indebted to the learned reporters, Messrs. Handy, for this case, which will be found in 2 Handy Rep. 193, now in process of publication.—*Eds. Am. L. R.*

Louis, which led to the arrest of Moses Kelly, one of the supposed criminals, who was in consequence taken to Hancock county, Kentucky, where he was tried, convicted, and executed for the murder. The other defendant, Ingalls, who was made a party to the action, it is averred, demanded a portion of the reward, for his pretended services for assisting in the arrest of the other fugitive, Robert Kelly, in Ripley county, Indiana. While the controversy was pending, J. E. O. Cozzens, who apprehended Moses Kelly in St. Louis, and the plaintiff in error Rea, who actually arrested Robert Kelly, were also made defendants. The case was submitted to Judge Storer, at special term, who heard the evidence adduced by the parties, and held that neither McMannus, Cozzens, Ingalls, or Rea, were entitled to receive any portion of the reward offered by the defendants, Smith and Gardiner. The plaintiff Rea excepted to the ruling of the court, and moved for a new trial, on the ground that the decision was against the law and the evidence, &c. This motion was overruled; to which the plaintiff also excepted, and now files his petition to reverse the judgment of the court. As the other claimants have not joined the plaintiff in this action, it is not necessary to refer to the evidence upon which they founded their claim. It was proved on the trial, to sustain the claim of the present plaintiff, that he was the sheriff of Ripley county, Indiana, when he arrested Robert Kelly, that a warrant was then in his hands, and that he called upon several persons to aid him. After the criminal was apprehended, he was held in the sheriff's custody for several days, brought in the meanwhile before an examining court, and finally taken by the same sheriff to Hancock county, Kentucky, where the culprit was tried, convicted, and executed.

The opinion of the court was delivered by

STORER, J.—The plaintiff in error has assigned several causes for the reversal of the judgment rendered in special term; but it seems to us, the only question in the record proper for us to decide is this:

Can a public officer, whose duty it is to arrest all persons charged with or suspected of the commission of crime, claim any other or further remuneration for his services, than the fees allowed by law?

It was in evidence on the trial, as it appears by the bill of excep-

tions, that the plaintiff in error was acting as sheriff, and had a warrant in his possession when he arrested the criminal. After his apprehension, the murderer was brought before an examining court, being then in the sheriff's custody, and there detained, until he was removed to the place of trial in Kentucky, on the requisition of the governor of that State.

We must regard, then, the arrest to have been made by a public officer, who supposed and believed he was in the proper discharge of his duty.

The law of Indiana forbids a sheriff, or other ministerial officer, to receive greater fees than those it allows for the ordinary discharge of their duties, and is similar in its terms to our own statute on the same subject. Both are enacted to prevent oppression and extortion by those who are bound to execute legal process. They but affirm the common law, which declared all contracts entered into upon any such consideration of no validity, and permitted the person who had paid any such extra compensation to an officer, to recover it back.

The leading case on this point is that of *Bridge vs. Cage*, Cro. Jac. 103. A sheriff brought his action to recover £60 upon an agreement, that if he executed a writ of elegit, he should receive that sum, in addition to his legal fees, and the court held he could not recover. The same rule is held in *Hobart*, 13 d.; *Norton vs. Simmes*, Sir William Jones' Rep. 65; *Badow vs. Salter*, S. C. Latch. Rep. 54. In *Stotesbury vs. Smith*, Burrows, 924, the question was again discussed. A *capias* was in the hands of the sheriff, who "agreed to receive Stotesbury as bail, on the assurance he should be paid six guineas for so doing. The bail was taken, but the sum promised was not paid to the sheriff, who now claimed to recover it, but the court would not aid him. The judges gave their opinions seriatim, and it may not be unprofitable to quote them briefly. Lord Mansfield said: "It is oppression to take money for doing what the officer ought to do, even though it be the mere using his discretion." Justice Dennison held "that he had never seen such a demand stated in a court of justice: the officer would have been liable to attachment for this fact, if he had been complained

of for it." Justice Foster said: "It would be a great inlet to oppression, if such a consideration could be established as legal;" and Justice Wilmot, whose opinion concluded the case, said "he thought this a most shameful and scandalous action." This case is again reported by Sir William Blackstone in 1 Black. Rep. 204, who well observes, the court rendered this judgment with much indignation upon the facts. Whether the same honest rebuke has been since applied, or whether a necessity has existed for its expression, it is not our province to inquire.

It is well said in 1 Hawkins' P. C. 68, pl. 4, "that if it should be once allowed such promises could sustain an action, the people would be quickly given to understand how kindly they would be taken care of, and happy would that man be, who could have his business well done without them."

So far has the principle been since carried in England, that Lord Ellenborough, following the case of *Harris vs. Watson*, Peake Cas. 72, held in *Stylk vs. Myrick*, 2 Camp. 317, "that a seaman to whom extra wages had been promised when the ship was in distress, could not recover them, as he was bound by the nature and terms of his contract to do his duty at all times, to the extent of his ability."

A similar doctrine is affirmed in *Lane vs. Surell*, 1 Chitty Rep. 175; *Dow vs. Harsons*, ib. 295, and *Woodgate vs. Knatchbull*, 2 T. R. 148.

The Court of Errors of New York, in *Hatch vs. Mann*, 15 Wendell, 50, fully adopt the English decisions, holding that a constable could not recover a larger compensation than the statute allowed, for serving process, and that a contract to pay him any such sum could not be sustained.

In *Pool vs. The City of Boston*, 5 Cushing, 219, the Supreme Court of Massachusetts decided that a watchman, whose duty it was to arrest criminals, could not claim a reward offered by the government, for the arrest and conviction of an incendiary.

The Supreme Court of Pennsylvania, in *Smith vs. Whildin*, 10 Barr, 39, held that a ministerial officer, who was bound to execute criminal process, could not claim a reward offered for the apprehension of a criminal. Judge Coulter in deciding the case, remarks:

“It would open a door to profligacy, chicanery, and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract ; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecution.” The Supreme Court of Tennessee, in *Stamper vs. Temple et al.*, 6 Humphreys, 113, affirm the same doctrine.

Our own Supreme Court, in *Gilmore vs. Lewis*, 12 Ohio, 281, have authoritatively settled the question, and we would have been content to have referred only to the well considered opinion of Judge Wood, without any other examination of the law, did we not feel it to be our duty—when the obligations of ministerial officers, we fear, are not always clearly understood, and in many cases are but slightly regarded—to re-affirm what we believe to be sound law and equally sound morality, and thus vindicate the principles by which official conduct should be regulated, and oppression, under color of law, redressed.

It is contended, however, that the plaintiff in error, though holding the office of sheriff when he made the arrest, acted as a private person ; that it was not his duty to apprehend a fugitive from the justice of another State, and cannot therefore be subjected to the rule we have indicated.

On referring to the Revised Statutes of Indiana, vol. 2nd, pp. 10–11, we find the sheriff is declared to be “a conservator of the peace, and is bound to execute all process directed to him by legal authority, and pursue and commit to the jail of the county all felons.” The power thus conferred is certainly broad enough to authorize the apprehension of murderers or felons, whether the offence was committed in Indiana or Kentucky ; and it is difficult for us to perceive how the duty could be denied by the officer in every proper case, whether the accused person was a fugitive, or a domestic felon. An admission of the contrary doctrine would change the character of the sheriff from that of a high public functionary, to whom the largest powers have been confided for the preservation of the public peace and the protection of private right, to the passive

condition of an agent, acting only as he may be directed by the magistrate or the court. We cannot so regard the question. Whenever an officer has made an arrest, he is presumed to have acted in his official character; and where, as in the present case, he performs the duty of a sheriff, believing he was acting within the authority he derived from the law, we cannot permit him to change his relation as an officer, and assume that of a private individual. He might well have arrested without a warrant upon probable cause of suspicion, if the necessity of the case required it, and he would have been protected if the accused should afterwards have been discharged. *Samuel vs. Payne*, Douglass, 359; *Hobbs vs. Branscombe and others*, 3 Campbell, 420; *Holly vs. Mix*, 1 Chitty's Crim. Law, 15, 3 Wendell, 353; Gwynne on Sheriffs, 523.

The precise question argued by the plaintiff in error was very fully examined by McCoun, V. C., in *City Bank vs. Banks and others*, 2 Edw. Ch. Rep. 95. In that case the bank was robbed of a very large sum of money, and a reward of \$10,000 offered for the detection of the criminals. The property lost was recovered, and a bill was filed by the bank to settle the rights of many claimants of the reward, among whom was the celebrated high constable Hayes. To avoid the operation of the principle, Hayes, who made the arrest without warrant, and found the money in the burglar's trunk, urged that he acted as a private person throughout the matter; no official duty being imposed upon him by any process. But the court held he was bound to arrest the criminal upon probable cause of suspicion, and having assumed to act, apprehended the culprit, and found the property upon search, he would not be permitted to deny his official character. He could not change the legal relation he sustained. He was asked to arrest a criminal by those who had good ground to suspect his guilt, on the supposition that he had the power to do so; he consented to discharge the duty, and having undertaken to perform it, he must abide by his official character.

We think the reasoning of this case disposes of the last objection made by the plaintiff, and fully authorizes us to decide what we should otherwise have decided upon general principles, that the

judge at special term committed no error in holding that there could have been no recovery for the present plaintiff.

It may be proper for us further to hold, that a sheriff, or any other ministerial officer, may arrest fugitives from the justice of any other State of the Union, and detain them for a reasonable time, until the requisition of the executive can be issued. We see no objection to such a course, and it is in harmony with the decisions of the tribunals of other States.

In R. M. Charlton's Reports, the Superior Court of Georgia held, that "one charged with felony in one State, and fleeing to another, may be arrested or detained until an opportunity is afforded to the proper authority to demand the prisoner."

In 4 Harrington, 572, the Supreme Court of Delaware decided, "that a judge or justice of the peace could order the arrest of a fugitive from justice before demand."

The same power is affirmed by Ch. Jus. Tilghman in *Respub. vs. Deacon*, 10 S. & R. 10, and again asserted in *Respub. vs. Wilson et al.*, 7 Law Intelligencer, 148.

In Ohio the same practice prevailed, even before the passage of the statute which now gives express power to magistrates to issue warrants, and ministerial officers to apprehend the fugitives.

It is not to be doubted that, in every proper case, a recovery may be had for a reward thus offered, by any person who gives the information by which the arrest is made, and the criminal punished. The proposal or offer to pay for the services, when accepted, creates a liability which the courts will enforce. The English cases on the subject are collected in a note to Chitty on Contracts, p. 559, ed. of 1855. See also *Wentworth vs. Day*, 3 Metcalf, 352; *Loring vs. Borton*, 7 do 441; *Gilmore vs. Lewis*, 12 Ohio, 281.

We supposed the reward offered may be apportioned upon equitable principles, in a proper case, among several parties, as the court may direct. It is so held in *Symmes vs. Frazier*, 6 Mass. 344, and in 2 Edw. Ch. 95, already quoted.

Whether the sheriff in this case, if there had been no legal objection to his claim, could have brought himself within the terms of the offer, we need not decide. It appears by his answer, that for seve-

ral days before the arrest, the criminal had been generally suspected, and was believed to be guilty, and that it was upon such information the party was apprehended. Nor is it now proper for us to say, whether the evidence established any knowledge, on the part of the officer, of the existence of the proposed reward, when the felon was taken into custody.

Without further reference to adjudged cases, we are satisfied to place our decision on the broad ground, that no officer of the law, who is sworn to perform his duties, and bound to perform them to the full measure of his ability, shall be permitted to violate the law; that the only safe ground for the officer to occupy is to receive no other compensation for his services than the statute allows; and on no other can he faithfully and impartially discharge his official obligations.

If it should be admitted, that the degree of vigilance is to be measured by the amount of extra compensation proffered or paid, and those upon whom is imposed the service of legal process are to be urged to duty by the promise of other reward than the fees allowed by law, the administration of justice will no longer be maintained in its certainty or its purity. He only may then rely upon the fulfilment of official duty, who has the ability to pay the largest equivalent, or the least scruple to propose it.

The judgment of the court in special term is affirmed.

Spooner & Brower, for plaintiff.

James & Jackson, for defendant.